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In the Supreme Court of the United States

OCTOBER TERM, 1978

PAUL L. POWELL,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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PEOPLE OF THE STATE OF ILLINOIS,

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PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

Petitioner prays that a writ of certiorari be issued to review the judgment of the Illinois Supreme Court in this case on March 23, 1978.

OPINIONS BELOW

The opinion of the Illinois Supreme Court is reported in 72 Ill.2d 50, 377 N.E.2d 803 (1978) and is reprinted herein as Appendix A, *infra.*

The original Illinois Appellate Court decision is reported in 48 Ill.App.3d 723, 362 N.E.2d 1329 (1st Dist. 1977). (Appendix B)

JURISDICTION

The judgment of the Illinois Supreme Court was entered on March 23, 1978. A timely petition for rehearing[1] was denied on July 14, 1978 (Appendix E).[2] This petition is filed within ninety days of the final order of the Illinois Supreme Court. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257.

QUESTION PRESENTED

Is the double jeopardy clause of the Constitution violated when the State is allowed to appeal to the highest court of the State from a judgment of an intermediate appellate court reversing the defendant's conviction because of insufficiency of the evidence and which judgment would be equivalent to a directed verdict of acquittal at the trial court level?

CONSTITUTIONAL PROVISIONS INVOLVED

". . .[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . ." Amendment Five to the United States Constitution.

". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . ." Amendment Fourteen to the United States Constitution.

ILLINOIS SUPREME COURT RULES INVOLVED

Rule 604. Appeals from Certain Judgments and Orders

(a) Appeals by the State.

[1] The pertinent parts of the petition are set out in Appendix C.

[2] A motion to stay the mandate was allowed on August 4, 1978 (Appendix F).

(2) *Leave to Appeal by State.* The state may petition for leave to appeal under Rule 315(a). (Amended effective Nov. 30, 1972.) (Italic subhead added effective Sept. 1, 1974.)

Rule 315. Leave to Appeal from the Appellate Court to the Supreme Court.

(a) Petition for Leave to Appeal; Grounds. A petition for leave to appeal to the Supreme Court from the Appellate Court may be filed by any party, including the state, in any case not appealable from the Appellate Court as a matter of right. Whether such a petition will be granted is a matter of sound judicial discretion. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed. (Amended effective Nov. 30, 1972 and Sept. 1, 1974.)

STATEMENT

Your petitioner, Paul Powell, is an attorney licensed to practice law in the State of Illinois. He was convicted in a bench trial in the Circuit Court of Cook County (Chicago), Illinois for the offenses of bribery and solicitation. The petitioner presented a timely appeal to the Illinois Appellate Court, First District (Chicago) wherein the three-judge Court, without dissent, held that the evidence

adduced at trial was insufficient to sustain the convictions. (A copy of that opinion is reported in 48 Ill.App.3d 723, 362 N.E.2d 1329 (1st Dist. 1977) (Appendix B.) The applicable Illinois Supreme Court Rule allows the State of Illinois, in criminal cases, to file petitions for leave to appeal to review judgments of the Appellate Court. (Rule 315(a), Illinois Supreme Court Rules) The Illinois Constitution, however, prohibits appeals from judgments of acquittals. Article VI, Sec. 6, Illinois Constitution of 1970.

The defendant moved to strike the State's brief on the grounds that an appeal from the decision of the Appellate Court violated the Illinois Constitution and the Fifth Amendment and Fourteenth Amendment right to be protected against double jeopardy. The Court, in its opinion (Appendix A), rejected the defendant's arguments and reversed the judgment of the Appellate Court of Illinois and allowed the judgment of conviction to stand.

This petition follows.

REASONS FOR GRANTING THE WRIT

A. As an appeal from a judgment of not guilty at the trial level is prohibited by the double jeopardy clause of the Fifth Amendment to the United States Constitution, so, too, is an appeal from a decision of a three-member appellate court, finding the evidence insufficient to convict. Any such appeal taken from an appellate court's judgment of acquittal violates the protection against being placed twice in jeopardy for the same offense.

Such a judgment by the Appellate Court is not materially different than a directed verdict of acquittal at the trial court level, to which double jeopardy would undoubtedly attach.

B. The Illinois Supreme Court rules which allow the State to appeal from an appellate court decision reversing a conviction for insufficiency of the evidence violate the constitutional guarantee against being placed twice in jeopardy for the same crime.

C. The decision of the Illinois Supreme Court allowing the State to appeal from an appellate court decision reversing a conviction for insufficiency of the evidence is in conflict with this Court's decisions of *Burks* v. *United States,* ..... U.S. ....., ... S.Ct. ....., 57 L.Ed.2d 1 and *Greene* v. *Massey,* ..... U.S. ....., ... S.Ct. ....., 57 L. Ed.2d 15.

A REVIEW OF THE APPELLATE COURT DECISION WHICH IN EFFECT ACQUITTED THE DEFENDANT OF THE CRIME CHARGED IS PROHIBITED BY THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION.

The petitioner here, Paul Powell, originally appealed his conviction to the Appellate Court of Illinois, First District, and sought a reversal of his conviction. The Appellate

Court, in finding that the evidence was insufficient to sustain a conviction, ordered the conviction set aside without retrial. *People* v. *Powell*, 48 Ill.App.3d 723, 362 N.E.2d 1329 (1st Dist. 1977). (Appendix B) The Constitution of the United States prohibits a government appeal from the finding of not guilty. *Fong Foo* v. *United States*, 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962); *Kepner* v. *United States*, 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114 (1904). There should be and there is no distinction when the acquittal is entered by an appellate rather than the trial court.

Illinois has a two-tier appellate court system. Most criminal appeals, as a matter of right, are taken to the Appellate Court of Illinois in the first instance. Illinois Supreme Court Rule 603. A party receiving an adverse ruling from the Appellate Court of Illinois may petition for leave to appeal to the Supreme Court to have the Supreme Court, in its discretion, review the judgment of the Appellate Court. Supreme Court of Illinois, Rule 315(a) allows any party, including the State, to petition for leave to appeal. 55 Ill.2d xii. Rule 604(a), which allows appeals by the State in criminal cases, reads in pertinent part:

> The State may petition for leave to appeal under Rule 315(a). 55 Ill.2d xiii.

The Illinois Supreme Court has construed those sections to allow the State to petition for leave to appeal in *all* cases including those in which the Appellate Court has reversed a conviction outright for insufficiency of the evidence. *People* v. *Schwartz*, 58 Ill.2d 274 (1974). We strongly contend that allowing such procedure violates the double jeopardy clause of the United States Constitution.

Had the defendant been acquitted at the trial level, there is no question that under either the Federal Constitution or the State Constitution there could not have been

an appeal to the higher court. *Fong Foo* v. *United States*, 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962); Article VI, Sec. 6, Illinois Constitution of 1970.

We strongly contend that allowing such procedure violates the double jeopardy clause of the United States Constitution and that Illinois Supreme Court Rules 604 and 614(a) insofar as they authorize such procedure are invalid. Once double jeopardy attaches at any point in the judicial process, the State's right of further review is exhausted.

THE ILLINOIS SUPREME COURT DECISION IS CONTRARY TO THIS COURT'S RULINGS IN BURKS v. UNITED STATES AND GREENE v. MASSEY.

This Court, during the last term, has held that a reversal by an appellate court for insufficiency of the evidence precludes a retrial of the defendant. *Burks* v. *United States*, ... U.S. ....., ... S.Ct. ....., 57 L.Ed2d 1; *Greene* v. *Massey*, ... U.S. ....., ... S.Ct. ....., 57 L.Ed.2d 15.

In *Burks, s pra*, the Court held that *there is no distinction* between a defendant's being acquitted at the trial level and a defendant's conviction being reversed for insufficiency of the evidence by an appellate court. In fact, this Court held, without dissent, that an outright reversal of a conviction is, in actuality, a holding that the trial court erred in not acquitting the defendant at the trial level.

> "... [S]uch an appellate reversal means that the Government's case was so lacking that it should not have even been *submitted* to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal —no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have

returned a verdict of guilty." *Burks* v. *United States*, 57 L.Ed.2d at 12.[3]

Had the defendant been acquitted at the trial level, there could not have been the appeal. It makes no difference, therefore, that the acquittal comes later. In fact, it is more significant because the appellate acquittal was rendered by three justices, whereas the trial acquittal was only entered by one judge.

It matters not that the State may believe that the Appellate Court was wrong in its decision. This Court in *Fong Foo* v. *United States, supra,* held that even though the District Court may have acquitted the defendant upon an erroneous foundation or understanding of the law, a Court of Appeals had no jurisdiction to entertain the appeal because the judgment of acquittal was final and could not be reviewed without putting the defendant twice in jeopardy and thereby violating the Constitution.

This Court has been careful in recent years in its double jeopardy rulings to obliterate labels and to look to the substance of the ruling.

In *United States* v. *Martin Linen Supply Co.,* 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977), the trial court, pursuant to Rule 29 of the Federal Rules of Criminal Procedure, entered a judgment of acquittal following the discharge of a hopelessly deadlocked jury. This Court held that a government appeal was precluded by the double jeopardy clause of the Fifth Amendment. The Court held that Rule 29 replaced the directed verdict mechanism used in *Fong Foo, supra,* and therefore, erased any distinction that may have confused the issue.

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[3] This Court's opinions in *Burks* and *Greene* were cited to the Illinois Supreme Court as additional authority in the petition for rehearing (see Appendix D). Those opinions did not sway the Supreme Court for it denied the petition for rehearing after those cases were cited.

Further, *United States* v. *Sisson,* 399 U.S. 267, 90 S.Ct. 2117, 26 L.Ed.2d 608 (1970), found no distinction between judge or jury when the protection of the double jeopardy clause is involved.

This case does not involve the dismissal of an indictment in mid-trial on a basis not related to factual guilt or innocence. *Cf., United States* v. *Scott,* ..... U.S. ....., ... S.Ct. ....., 57 L.Ed.2d 65. A defendant is acquitted however when "the ruling of the judge, whatever its label, actually represents a resolution (in the defendant's favor) correct or not, of some or all of the factual elements of the offense charged." *United States* v. *Martin Linen Supply Co.,* 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977).

The Illinois Appellate Court opinion resolved some of the factual elements of the offense charged in the defendant's favor and whether correct or not is an acquittal.

Last term this Court in *Sanabria* v. *United States,* 57 L. Ed.2d 43, decided a case in which the trial court acquitted the defendant at mid-trial after it suppressed certain evidence. The Government sought an appeal. This Court held that the appeal was barred by the double jeopardy clause of the Constitution in that the court had entered a judgment of acquittal based on the insufficiency of the Government's evidence, the court having suppressed some of the evidence. In *Sanabria* the petitioner was not guilty for failure of proof on a key factual element of the offense which charged that he was "connected with the illegal gambling business." The Court held that the double jeopardy clause is not such a fragile guarantee that its limitations can be avoided by the simple expedient of dividing a single crime into a series of temporal or spatial units. So, too, it is not so fragile as to be defeated by the label of the Court that enters the judgment that the evidence was insufficient to convict the defendant. And as it is held in *Burks,* the Appellate Court's reversal is a holding that

the trial court erred in not acquitting the defendant in the first instance.

The Government conceded in *Martin Linen Supply Co.* that if the court had directed a verdict during trial no Government appeal would lie but because the acquittal came after the mistrial an appeal was proper. This Court was not persuaded by the logic and held that the order of a directed verdict was non-appealable no matter when entered by the trial court.

The test regarding the appealability of a court order was set out in *Serfass* v. *United States,* 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975) wherein it was held that a legal determination based on facts adduced at the trial relating to the general issue of the case precluded a Government appeal.

That is exactly the posture of this case. The decision of the Appellate Court of Illinois here was "a legal determination on the basis of facts adduced at the trial relating to the general issue of the case." As held in *Burks, supra,* the Illinois Appellate Court decision was a ruling that the trial court erred in *not directing a verdict of not guilty.* Had the trial court not so erred there would have been no appeal. *United States* v. *Martin Linen Supply Co., supra, Fong Foo* v. *United States, supra.*

There can, therefore, be no question that once the Appellate Court corrected the error and in effect acquitted the defendant, no appeal could be taken to another court.

What an anomaly any other ruling would be! To allow the appeal here would mean that the trial court erred in not entering a directed verdict, which, had it been entered, would not have been an appealable order, but, because the trial court did not and it was error not to do so, an appeal will lie from the Appellate Court entering the proper order.

Here, an appellate court, in reviewing the facts adduced at the trial and the charge in the indictment, held that the

evidence was insufficient to sustain the charge and therefore set aside the conviction. The embarrassment, expense and ordeal to a defendant and compelling him to live in a continuing state of anxiety and insecurity, which the double jeopardy clause was meant to prevent (*Green* v. *United States,* 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)), will only increase if competent decisions by learned appellate court justices acquitting defendants in criminal cases are appealed to higher and higher courts without cessation.

CONCLUSION

Logic and consistency dictate that the Fifth Amendment which is applicable to the State of Illinois through the Fourteenth Amendment, *Benton* v. *Maryland,* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), precluded the State's appeal here and that the decision of the Illinois Supreme Court should be reversed.

This Court's decisions in *Burks* v. *United States, supra,* and *Greene* v. *Massey, supra,* logically hold that an appeal may not be taken from an appellate court reversal of a conviction for insufficiency of the evidence.

For the foregoing reasons, we respectfully request that the petition for *certiorari* issue in this case.

Respectfully submitted,

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APPENDIX

APPENDIX A

Docket No. 49676—Agenda 5—January 1978.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant,

v. PAUL POWELL, Appellee.

MR. JUSTICE UNDERWOOD delivered the opinion of the court:

Defendant, Paul Powell, was convicted of bribery (Ill. Rev. Stat. 1973, ch. 38, par. 33—1(a)) and solicitation (Ill. Rev. Stat. 1973, ch. 38, par. 8—1) in a bench trial in the circuit court of Cook County. He was sentenced to two years' conditional discharge and fined $4,000 on the bribery charge, and two years' conditional discharge on the solicitation conviction. The appellate court reversed both convictions (48 Ill. App. 3d 723), and we granted leave to appeal. We reverse the appellate court.

The fact that the appellate court found "there is no evidence that Paul Powell tendered money to Jose Martinez to influence Martinez in either securing witnesses or investigating or prosecuting the criminal case entitled People v. Guevara" (48 Ill. App. 3d 723, 728) necessitates more extensive treatment than we would normally consider required by this case.

Officer Jose Martinez, an investigator for the Gang Crimes Investigation Division of the Chicago Police Department, was the sole prosecution witness. His testimony, in substance, was that he had been assigned on July 13, 1973, to investigate a case involving Awilda Torres, who had been repeatedly stabbed on July 11. On the next day he arrested Juanita Guevara, the alleged assailant. She was charged with aggravated battery, and a preliminary hearing on this complaint was set for July 26.

Officer Martinez appeared at the hearing on July 26 and asked the court for a continuance because the stabbing victim, Awilda Torres, was still in the hospital in serious condition. At this hearing attorney Paul Powell, who appeared as Juanita Guevara's defense counsel, followed the officer out of the courtroom and asked to see the arrest report in the officer's case file. The officer complied, and Powell then motioned him to the southwest corner of the hallway and told him that the parents of the Guevara girl intended to sign complaints against Awilda Torres, charging her with beating Juanita's sister prior to the stabbing. The officer replied that they had the same rights as the victim, if they had a valid complaint. Powell then suggested to Officer Martinez that perhaps they could "get together" on the case, to which the officer replied that he did not work that way. Powell then gave him a business card, asked him to call in two weeks, and stated that he could get him a "bill" now and a "bill" in two weeks. Officer Martinez testified that he understood a "bill" to be street parlance for $100. The officer repeated that he did not work in that manner.

Later that day, Officer Martinez reported the incident to his supervising sergeant. The next day he related the conversation to the Internal Affairs Division of the Chicago Police Department and to an assistant State's Attorney.

On August 10, an assistant State's Attorney, with proper authorization, placed a recording device on a telephone in his office. Officer Martinez then used that telephone to call Powell at the latter's office. During the conversation, Powell again asked if he and Officer Martinez could get together on the case. The officer said "yes."

A court hearing in People v. Guevara was scheduled for August 20. Earlier that morning, a small, hidden tape recorder was attached to Officer Martinez. The officer controlled the device by means of a switch concealed in his right pocket. He was instructed to activate the recorder in Powell's presence, but not when there was excessive background noise or several people speaking at once. He then went into the courtroom. When Powell entered the courtroom and took a seat next to him, the officer turned on the switch and recorded their conversation. This recording was introduced into evidence at Powell's trial. During the conversation, Powell and Officer Martinez discussed how much money would be available for the latter. Finally, Powell offered Officer Martinez $250 if he could get the complaining witness to "drop the charges" against Powell's client. During a recess, Powell repeated this offer. The officer asked just how he could do this, and Powell told him to take the complaints against the victim and use them as leverage to get the victim and her parents to drop their complaints against his client, Juanita Guevara. Powell then gave Officer Martinez a hospital bill purporting to show that the sister had been hospitalized from July 14 through July 17. Powell thereafter obtained a court continuance until October 18.

On that morning Officer Martinez went to the office of the State's Attorney accompanied by the stabbing victim, members of her family and two witnesses. There, Officer Martinez was again fitted with a hidden recording device. He then proceeded upstairs to the courtroom where People v. Guevara was to be called, leaving the victim, her family and the witnesses waiting in the State's Attorney's office. Outside the courtroom, he met Powell, who asked if the charges were to be dropped, to which

Officer Martinez replied "yes," that the victim and her family had told him to "forget about it."

When the case was called, Officer Martinez, pursuant to instructions from an assistant State's Attorney, falsely testified under oath that the prosecution witnesses did not want to prosecute because the victim feared retaliatory prosecution for beating Juanita Guevara's sister. The aggravated battery charge against Juanita Guevara was then stricken on leave to reinstate, and Officer Martinez and Powell left the courtroom.

Once in the hallway outside the courtroom, Officer Martinez testified he turned off the microphone because of noise. According to the officer, Powell told him to come by his law office at 2 p.m. that day. He refused, whereupon Powell asked him to follow Powell to his automobile which was parked outside the building. At Powell's request, the officer stayed a few steps behind Powell, and for this reason, he did not turn the hidden microphone on at that time. Both entered the car, and Powell began to drive around the block. As they approached a corner, he threw two $100 bills and a $50 bill on the floor in front of Officer Martinez's shoes. The officer picked the money up and handed Powell a subpoena to appear before the Cook County grand jury concerning the bribery which had just been completed. Officer Martinez then left the car. Powell drove a short distance, got out of his car and approached Officer Martinez, who turned on the miniature recorder. The ensuing conversation led to the indictment for solicitation of the offense of obstructing justice.

The tape of this conversation and a transcript thereof were admitted into evidence. It would unduly prolong this opinion to quote all of the relevant portions of this or the August 20 taped conversations. While background noise

renders parts of both unintelligible, that which is intelligible may be fairly characterized as devastating to any contention that Officer Martinez initiated the monetary discussion or that Powell's payment was for any legitimate purpose. In the October 18 conversation defendant repeatedly pleads for a "pass," states the officer is "blowing my whole license," and urges the officer to hide the money and tell the State's Attorney defendant "stiffed him" (failed to pay). The following excerpt is illustrative:

> "Mr. Powell: Please go with me and tell him I stiffed you.
>
> Officer Martinez: I can't. I—I—
>
> Mr. Powell: Tell him I stiffed you.
>
> Officer Martinez: I just can't.
>
> • • •
>
> Mr. Powell: Please. I'm the president of my synagogue. Oh, my God, you're gonna—Please, can we go back and see him?
>
> Officer Martinez: See who, Mr. Momeyer?
>
> Mr. Powell: Yeah, the State's Attorney.
>
> Officer Martinez: Well—
>
> Mr. Powell: Let me talk to him now. Let me talk to him. Tell him I stiffed you. I'll—I'll—I'll do anything you want. Anything, you name it. And tell him I stiffed you. I promised you the bribe but I didn't give it to you. You give me back the two-and-a-half. I'll drop anything you want any place."

Defendant was the only defense witness. He testified in substance that immediately after the July 26 appearance he told Officer Martinez that his client's parents wished to sign a complaint against the victim. The officer informed Powell that the case was closed and asked for $100 to do the extra paper work involved in opening up a closed file.

Officer Martinez had earlier testified that after Juanita Guevara had been arrested, the case was considered closed and that the word "closed" was stamped across the file. Powell told Officer Martinez that since he had only been paid $40, he could not possibly pay him $100.

When the parties were again in court on August 20, according to Powell, Officer Martinez indicated that he was expecting to receive some money. Powell told him that he had never offered him any payment. The officer then offered to get the victim to "drop the charges," if Powell would pay him $250. Powell thought that this was an ideal opportunity to get the officer to "take the complaints" of the Guevara family, since in the interim between appearances he had discovered that they were unable to file their complaints against Awilda Torres.

Powell testified that, during the August 20 conversation, he gave Officer Martinez a bill showing that his client's sister had been hospitalized. The officer originally doubted the authenticity of the bill, so he told him he would get him another bill. Powell testified that Officer Martinez confused Powell's reference to a "bill" with a hundred dollars, rather than a hospital bill. On cross-examination Powell was presented with the following portion of the August 20 conversation, which had been recorded by Officer Martinez's hidden microphone:

> "Officer Martinez: You told me last time a bill.
> Mr. Powell: Yes, a C-note, a hundred dollars.
> Martinez: A hundred dollars.
> Mr. Powell: A hundred dollars."

Powell explained that this was another portion of the conversation.

Powell testified that at his next appearance on behalf of Juanita Guevara on October 18, 1973, Officer Martinez

approached him after the case had been stricken on leave based on the officer's false testimony. The officer demanded $250, but Powell denied making any promises and attempted to get away from him. Officer Martinez followed him to his car, located in front of the court building, and got in before Powell could lock the door. The officer's gestures indicated that he wanted money. Powell testified that he thought Officer Martinez had a gun and that he feared that the officer would shoot him there. He then threw the $250 on the floor in order to get rid of the officer, who picked it up and handed Powell a grand jury subpoena. Powell testified that he became hysterical and could not remember anything about the conversation which thereafter occurred.

At the close of this evidence, the trial judge found Powell guiity of bribery and solicitation. The appellate court reversed the bribery conviction, finding that the People did not prove bribery as it was charged in the indictment, nor were the acts sought by Powell related to the performance of the officer's official duties. That court also reversed the solicitation conviction, finding insufficient evidence that the alleged solicitation was done with the requisite intent to obstruct the apprehension or prosecution of a specific person.

We consider first defendant's contention that an appellate reversal because of insufficient evidence is tantamount to an acquittal and cannot be appealed by the People under the double jeopardy protections of the Illinois and Federal constitutions. This precise issue was decided in *People* v. *Schwartz* (1974), 58 Ill. 2d 274, wherein this court said:

> "The defendant in this case was not acquitted in the trial court. He was convicted, and the process

of review has not been completed. (See *People* v. *Chupich* (1973), 53 Ill. 2d 572, 581-4.) It was the appellate court that found the evidence insufficient, and the question is as to the finality of that court's judgment.

That question is governed by section 4(c) of article VI of the Illinois Constitution, which enumerates certain instances in which an appeal from the appellate court to the supreme court is a matter of right, and then states: 'The Supreme Court may provide by rule for appeals from the Appellate Court in other cases.' Acting under that authority, on November 30, 1972, this court amended the first sentence of Rule 315(a), which deals with discretionary appeals from the appellate to the supreme court, by adding the italicized portion: 'A petition for leave to appeal to the Supreme Court from the Appellate Court may be filed *by any party, including the State,* in any case not appealable from the Appellate Court as a matter of right,' (55 Ill. 2d xii.) At the same time Rule 604(a), which deals with appeals by the State in criminal cases, was amended by adding the following sentence: "The State may petition for leave to appeal under Rule 315(a).' 55 Ill. 2d xiii.

Insofar as the law of Illinois is concerned, therefore, we hold that the judgment of the appellate court is subject to discretionary review in this court. And insofar as the Constitution of the United States is concerned, we are not aware of any provision that would affect the right of a State to establish a two-tier system of appellate review or to determine whether final review is to be by 3, 5, 7, or 9 judges." 58 Ill. 2d 274, 276-77.

Respondent presents no persuasive reason to overrule *Schwartz,* and we adhere to it.

The bribery section of the Criminal Code of 1961 provided:

> "A person commits bribery when:
>
> (a) With intent to influence the performance of any act related to the employment or function of any public officer, public employee or juror, he promises or tenders to that person any property or personal advantage which he is not authorized by law to accept * * *." (Ill. Rev. Stat. 1973, ch. 38, par. 33—1.)

The bribery indictment alleged in part:

> "with the intent to influence the performance of acts related to the employment and function of a public employee, Jose Martinez, he [Powell] promised and tendered to that person property which Jose Martinez is not authorized by law to accept, to wit: Paul Powell did promise and tender a quantity of United States currency to Chicago Police Officer Jose Martinez, to influence Martinez in the securing of witnesses, and investigation and prosecution of a criminal case entitled *People* v. *Juanita Guevara* in the Circuit Court of Cook County."

The appellate court found that Powell never actually told Officer Martinez not to bring a witness to court, and that, even if he did, the bringing of witnesses to the courtroom was not related to the official duties of the officer. Officer Martinez testified, however, that his function and role as a police officer was to "investigate crime, secure witnesses, bring enough evidence to court," and that inquiries as to the availability of witnesses were part of his "official duties." But such testimony is not essential. It is common

knowledge of which we take judicial notice that a principal duty of a policeman or any other law enforcement officer is the enforcement of the law. That payments made to an investigating officer in a criminal case to induce him to persuade key prosecuting witnesses not to appear or to withdraw a complaint are not intended to influence the performance of the officer's duties in investigating, identifying and securing witnesses in criminal cases is an argument we believe does not merit further discussion. Nor, in our judgment, can it be said that a police officer's official duties in a case have been terminated simply because of a departmental administrative practice to designate a case as "closed" or "completed" once a suspect has been arrested and a complaint filed. It seems to us clear that an important part of any investigating officer's official duties is the location and procuring of witnesses for the prosecution or for the defendant so that the result of a crime will be a fair trial and punishment for the proper person.

People v. *Clemons* (1962), 26 Ill. 2d 481, is relevant here. There two Cook County deputy sheriffs were convicted for receiving money in return for not arresting four youths. On appeal, the officers contended that the State failed to prove that they had an absolute duty to make an arrest and that therefore it was not within their official duties. Thus, they contended, no bribery could have occurred since money was paid for something which was not necessarily an official duty in that particular instance. The court rejected this technical argument, stating:

> "The essence of the crime of bribery is the giving to, and receiving or acceptance by, a public officer of something of value to influence him in the performance of his official duty, whether it be termed general or specific." 26 Ill. 2d 481, 483.

The appellate court erred in reversing the bribery conviction.

That court erred, too, in reversing the conviction for solicitation. Defendant contends and the appellate court agreed that the solicitation indictment was invalid because it did not allege which person's apprehension Paul Powell was seeking to prevent, thus failing to inform the accused of the nature of his offense and preventing him from adequately preparing his defense. The appellate court also found insufficient proof of this element. We regard both contentions as without merit.

The obstructing justice section of the Criminal Code provides:

> "A person obstructs justice when, with intent to prevent the apprehension or obstruct the prosecution or defense of any person, he knowingly commits any of the following acts:
>
> (a) Destroys, alters, conceals or disguises physical evidence, plants false evidence, furnishes false information * * *." Ill. Rev. Stat. 1973, ch. 38, par. 31-4(a).

Also, under the Criminal Code:

> "A person commits solicitation when, with intent that an offense be committed, he commands, encourages or requests another to commit that offense." Ill. Rev. Stat. 1973, ch. 38, par. 8-1(a).

The crime of solicitation is committed when a person, with intent that an offense be committed, commands, encourages or requests another to commit that offense. (Ill. Rev. Stat. 1973, ch. 38, par. 8—1(a).) Obstructing justice occurs when one, with intent to prevent the apprehension or obstruct the prosecution or defense of any

person, knowingly commits one of certain enumerated acts, including concealing physical evidence or furnishing false information. (Ill. Rev. Stat. 1973, ch. 38, par. 31—4(a).) The testimony of Officer Martinez, coupled with the earlier noted transcript of the conversation which occurred after Officer Martinez gave Powell the grand jury subpoena, clearly establishes that Powell solicited the obstruction of justice. Telling the assistant State's Attorney that Powell "stiffed" Officer Martinez, or did not pay him the bribe money, obviously involves concealing the $250. In addition, Powell directly encouraged the officer to hide the currency, which was later introduced against Powell as People's exhibit No. 7. As to the sufficiency of the indictment, we note that it alleged:

> "Paul Powell committed the offense of solicitation in that with intent that the offense of obstructing justice be committed, encouraged and requested Chicago Police Officer Jose Martinez to commit that offense, to wit: knowingly encouraged and requested Jose Martinez to conceal $250.00 in United States currency, said currency being physical evidence that the offense of bribery was committed by Paul Powell on or about October 18, 1973.
>
> In violation of Chapter 38, Section 8—1, Illinois Revised Statutes, 1973."

In our judgment this indictment did in fact allege the name of the particular person—namely, Paul Powell—whose apprehension Officer Martinez would intend to prevent if he had concealed the evidence as defendant had requested. An indictment which charges an offense in the language of the statute is sufficient when the statute itself apprises the defendant with reasonable certainty of the precise offense with which he or she is charged. (*People* v. *Grant* (1974), 57 Ill. 2d 264, 267; *People* v. *Harvey* (1973),

53 Ill. 2d 585, 588; *People* v. *Patrick* (1967), 38 Ill. 2d 255, 258.) Whether a charge is sufficient "is to be determined by the substance of the charge and not the technicalities of its language." (*People* v. *Mahle* (1974), 57 Ill. 2d 279, 283.) This indictment is first couched in the language of the solicitation statute, then goes on to specify the key elements of the crime solicited; a common sense reading of it makes difficult a belief that Powell could not properly prepare his defense because the indictment was not sufficiently specific. In any event, "[t]he office of a bill of particulars is to provide more specificity of detail to supplement a sufficient indictment so as to enable an accused better to understand the nature of the charge against him or better to prepare his defense." *People* v. *Patrick* (1967), 38 Ill. 2d 255, 260. No bill of particulars was requested.

The defendant attacks the credibility of Officer Martinez and the probative value of the State's evidence on the grounds that there are variances in the officer's testimony, that the tape recorder was under his control, and that he is an admitted perjurer in that he falsely stated to the court under oath that the Guevara family did not want to prosecute the charges against defendant's client. While we do not want to be understood as encouraging or condoning the false testimony, the fact remains that the discrepancies in the officer's testimony are not significant, and neither his control of the recording switch nor the alleged perjury diminishes or explains away the incriminating character of defendant's recorded conversation.

> "[W]here a case is tried by the court without a jury, the determination of the credibility of the witnesses and the weight to be accorded their testimony is committed to the trial judge; and, unless it can be

said that the court's judgment is found to rest on doubtful, improbable or unsatisfactory evidence, or clearly insufficient evidence, a reviewing court will not substitute its judgment for that of the court below even though evidence regarding material facts is conflicting and irreconcilable. (*People* v. *West*, 15 Ill. 2d 171.)" *People* v. *Clemons* (1962), 26 Ill. 481, 484.

This rule is well settled in Illinois. (See *People* v. *Jones* (1975), 60 Ill. 2d 300, 307; *People* v. *Fleming* (1971), 50 Ill. 2d 141, 145.) The trial judge, who was aware of the alleged perjury, saw and heard the witnesses. He found the evidence sufficient, and we find nothing in this record justifying a contrary conclusion.

The judgment of the appellate court is reversed, and the judgment of the circuit court of Cook County is affirmed.

Appellate court reversed;
circuit court affirmed.

APPENDIX B

PEOPLE of the State of Illinois, Plaintiff-Appellee,

v.

PAUL POWELL, Defendant-Appellant.

No. 61752
Appellate Court of Illinois
First District, Fourth Division.
April 28, 1977.

Defendant, an attorney, was convicted in the Circuit Court, Cook County, Louis Garippo, J., of bribery and solicitation and he appealed. The Appellate Court, Dieringer, P. J., held that: (1) one could not be convicted of bribery for offering money to a police officer to do something which the police officer had no authority to do; (2) evidence was insufficient to show that defendant bribed police officer; and (3) evidence was insufficient to show that defendant solicited police officer to obstruct prosecution.

Reversed.

Dieringer, Presiding Justice.

Paul Powell, an attorney at law, was indicted for the offense of bribery in indictment No. 73-6348, and for the offense of bribery, solicitation and attempt in indictment number 73-6349. Both indictments were consolidated for trial, and the evidence offered at trial was the testimony of Officer Martinez of the Chicago Police Department, certain tapes and transcripts of taped conversations between Officer Martinez and Paul Powell, as well as the testimony of Paul Powell (defendant). The trial was held without a jury. Powell was found guilty of bribery in in-

dictment number 73-6348 and solicitation in indictment number 73-6349. He was acquitted of all other charges and sentenced to two years conditional discharge and a $4,000 fine on the bribery conviction, and two years conditional discharge on the solicitation conviction.

The issues presented for review are (1) whether the defendant's conduct amounted to bribery, (2) whether there was sufficient evidence to sustain the conviction of the defendant for bribery as alleged, (3) whether there was a fatal variance between the proof adduced at trial and the allegations in the bribery indictment, (4) whether the indictment for solicitation charged an offense with the specificity required by law, and (5) whether there was sufficient evidence of solicitation as alleged to sustain the conviction. The pertinent facts follow.

On July 11, 1973, Awilda Horres was allegedly stabbed several times by Juanita Guevara. Juanita Guevara was arrested on July 14, 1973, and her cause was set for preliminary hearing in Branch 24 of the circuit court of Cook County for July 26, 1973. She retained Paul Powell as her attorney and on July 26th he appeared for her in court. On that date Officer Jose Martinez appeared and asked the court for a continuance since the victim of the stabbing was in the hospital and could not appear to testify. The case was continued until August 20, 1973.

As Officer Martinez left the courtroom on July 26th, Powell approached him and asked to see the arrest report in the officer's file. The officer handed a copy of the report to him. Powell then told the officer the parents of the girl charged with the stabbing were intending to go to the district police station and sign a complaint against the victim, Awilda Torres, charging her with the battery of Rose Guevara, the sister of Juanita Guevara.

According to Powell, Martinez told Powell the case was closed and there would be a great deal of paper work, and asked Powell for $100 to take the complaints from the parents of Juanita Guevara. Powell told the officer it was not possible to pay $100, since Powell himself was not being paid that much. Powell left the officer with the understanding the Guevara family would contact the officer about filing a complaint, but no agreement was reached concerning the $100 asked for by Martinez. Later in the day Martinez in fact saw Juanita Guevara at the police station. He spoke to her father who wanted to file a complaint against Awilda Torres for striking Rose Guevara.

According to Martinez, on July 26th Powell asked about the complaint and mentioned that the Guevaras were planning to swear out complaints against Awilda Torres. Powell then gave Martinez a business card and asked him to call in a couple of weeks. Powell said, "I'll give you a bill now and a bill in two weeks." The officer took the word "bill" as slang to mean $100.

Officer Martinez reported this incident to his superior officers and then to the state's attorney's office, where he was equipped with a recording device to be used on the date of the next court appearance, August 20, 1973. This device was attached to the officer's body in such a way as to be concealed from outside view. It was turned on at the discretion of the officer and was, at all times, under his control.

On August 20, 1973, during a recess of the court, Powell and Martinez had a discussion. According to Powell, Martinez was expecting some money and told Powell that Martinez could get the complainant to drop the charges against Powell's client if Powell would pay Martinez $250 for doing so. Powell was taken by surprise and told Martinez

to go back in the courtroom for a few minutes, and Powell would think about it. Later, in another conversation between Powell and Martinez, Powell, while attempting to clear up the discrepancy over whether the officer wanted the money to do the paper work of filing a complaint or for getting the complaining witness to drop the charges, inquired of Martinez, 'I'll give you $250 and you'll get them to drop the case, is that right?'', and Martinez answered "Yes." The men parted and the case, when called, was continued until October 18, 1973. When the parties left the courthouse, Powell instructed his client and her family to locate Officer Martinez and swear out a complaint.

According to Officer Martinez, Powell offered the officer $250 if he could get the complainant to drop the charges. The officer asked how he was supposed to do that, to which Powell replied the officer could take a complaint from Juanita Guevara's parents alleging the complainant had injured their daughter, Rose, in the same incident out of which the battery charge grew. Then Officer Martinez could use the complaint as leverage to get the charges dropped against his client, Juanita. In connection with this conversation Powell gave the officer a hospital bill which purported to show Rose Guevara had in fact been in the hospital on July 17, 1973.

On the next court date in the case of *People* v. *Guevara,* on October 18, 1973, arrangements were made for Officer Martinez to again have recording equipment on his person and for Martinez to lie to the court, under oath, concerning the Torres family's unwillingness to prosecute. Martinez said the whole idea and suggestion to give perjured testimony came from the chief of the state's attorney's Criminal Division. This perjured testimony came to light later at Powell's trial when Martinez admitted his perjury at the Guevara trial.

Powell said on October 18, 1973, he and his client were ready for, and demanded trial. Powell was prepared with 11 witnesses for the defense. But, while the Torres family waited in the state's attorney's office, Officer Martinez, under oath, falsely told the judge the Torres family did not wish to prosecute. As a result, the case was stricken off the call and Powell and Martinez left the Criminal Court Building. There is no indication the judge had any knowledge of the officer's perjured testimony, and neither did Powell. He was ready for trial. Later, during the trial of Powell, Officer Martinez admitted Powell never told the officer not to bring witnesses to court. Coincidentally, Martinez testified it is not a rule of the Chicago Police Department that an officer bring witnesses to court.

Once outside the courthouse, Powell and Martinez again conversed. According to Martinez, Powell tried to avoid the officer, but finally the officer followed Powell to Powell's auto, which was parked a short distance from the courthouse. After both men entered the car, Powell drove around the block, and as he did so he threw $250 on the floor of the car. He asked Martinez if that was all right, and the officer said it was and assured Powell the case would not reappear in court. Powell then pulled to the curb. As Officer Martinez got out of the car, he handed Powell a Grand Jury subpoena relative to the alleged instant bribery, and then secretly turned on the hidden recorder. Powell told the officer he was blowing Powell's license to practice law and started to cry. Martinez ignored Powell's pleas and left Powell to return to the state's attorney's office.

According to Powell's testimony, on October 18th, while outside the courthouse, Martinez followed Powell and demanded $250. Powell said he did not promise anything to Martinez and told Martinez to leave him alone. Powell

ran to his car and got in. However, Martinez followed, entered the car before Powell could lock the door, and asked again for the money, while making threatening gestures. Powell became afraid of the officer and did not know what to do. In order to get rid of Martinez, Powell threw $250 on the floor of the car. Martinez picked up the money and handed Powell a Grand Jury subpoena.

Powell points out the fact that Martinez had the tape recorder off during the time between Officer Martinez' false testimony in court and the time Martinez handed the Grand Jury subpoena to Powell.

The record reveals a transcript of the recorded conversation only after Martinez served the subpoena on Powell.

At the close of all the evidence, the trial judge, sitting without a jury, found Paul Powell guilty of bribery and solicitation. Defendant then proceeded to this appeal of the judgments.

Defendant's first contention is he was not proven guilty of bribery as charged.

Bribery, in Illinois, is the tendering of money to a public employee to influence the performance of an act related to the public employee's official function. (Ill. Rev.Stat. 1973, ch. 38, par. 33—1(a).) It is not bribery to pay money to a public employee unless it is proven the defendant intended to influence the public employee in the performance of his official duties.

The charge, leading to defendant's bribery conviction, alleges the defendant paid money and intended to influence Officer Martinez in the securing of witnesses, and investigation and prosecution of a criminal case entitled *People* v. *Guevara.* Defendant denies intending to influence Officer Martinez in either the securing of witnesses or investigating the case, and claims it is not the official duty of a police officer to determine whether or not to prosecute a criminal case.

As to the charge of influencing Officer Martinez in the securing of witnesses, the indictment does not allege whether Powell tried to influence Martinez to secure witnesses or to refrain from securing witnesses, but it is of no consequence since the record reflects Powell did neither.

On cross-examination of Martinez the following took place:

> Q. "At no time did Mr. Powell ever tell you not to bring witnesses to court, did he?"
> A. "No, he did not."

There is also no evidence of whether Powell asked Martinez to bring witnesses to court. In addition, Officer Martinez testified the subpoenaing or bringing witnesses to court was not related to the performance of his official duties, and there is no rule of the Chicago Police Department requiring him to bring witnesses to court.

As to the charge of influencing Officer Martinez in the investigation of the case of *People* v. *Guevara,* Martinez testified that with Juanita Guevara in custody, the case was considered closed as early as July 19, 1973, and the word "closed" was stamped across his report. Since Powell never entered the case until July 26, 1973, a time after the investigation by Martinez was complete, the defendant could not possibly influence such investigation.

In regards to the charge of influencing Martinez in the prosecution of *People* v. *Guevara,* nowhere in the State of Illinois is a policeman given the power or authority to prosecute a criminal case. The duty to prosecute offenses

in this state lies with the state's attorney of the county where the offense is alleged to have occurred. Ill.Rev.Stat. (1973), ch. 14, par. 5.

One cannot be convicted of bribery for offering money to someone to do something that person has no authority to do. The act sought is not related to the performance of an official act of the policeman. Martinez could not prosecute the case of *People* v. *Guevara* and therefore he could not be influenced in the prosecution of that case as the indictment alleges.

Inasmuch as there is no evidence that Paul Powell tendered money to Jose Martinez to influence Martinez in either securing witnesses or investigating or prosecuting the criminal case entitled *People* v. *Guevara,* this court will reverse the bribery conviction.

We now turn to an examination of the allegation of solicitation.

The defendant testified that prior to any court appearance, his client made several attempts to file a criminal complaint, at the local police station, against the complainant, Awilda Torres. But, no one would accept the complaint. Not until they were in court did the defendant approach Martinez for the first time. They discussed the possibility of Powell's client swearing out a criminal complaint against the complainant, and Martinez allegedly asked for $100 for doing the extra paper work in accepting the complaint. On the day of a subsequent court hearing in *People* v. *Guevara,* Martinez is alleged to have said for $250 he would get the complainant to drop the charges.

As noted above, the evidence presented by the prosecution consists chiefly of the testimony of Martinez and tape recordings.

The fact of Martinez being an admitted perjurer must be examined along with the weight given the recordings, as Martinez had complete control over what parts of the conversations were taped and what portions were not. The on-off switch of the recorder was in Martinez's right pocket, and could be turned off and on as Martinez pleased. This resulted in the taped conversations being taken completely out of context, and only of Powell. As if to justify this method of discriminate taping, he testified he was advised by an assistant state's attorney to turn on the recorder only when necessary. It is significant that the recorder was turned off during the crucial conversation which took place immediately prior to when the alleged bribery money was transferred. Powell maintains Martinez demanded the money and made threatening gestures. Martinez admits Powell tried to avoid the confrontation, as he told Martinez not to get too close and to come to Powell's office later in the day. Martinez admittedly refused to withdraw his persistence, and yet waited until Powell threw the $250 on the floor before turning the recorder on.

Since the tape recorded conversations were taken out of context and are admittedly incomplete, to be reliable they must be supported by credible testimony that the unrecorded conversations were consistent with the tapes. This requires a determination of the weight to be given to the testimony of Martinez.

At the outset, Martinez is a confessed perjurer, and perjury is most damaging to one's credibility.

Martinez explains he was instructed to lie to the court at the October 18th hearing in the interest of obtaining a bribery conviction against the defendant, although the so-called bribery had not yet occurred.

The evidence discloses (1) a tape recording device was placed on Officer Martinez, (2) perjury was admittedly given by the officer to the court while the defendant was ready, with 11 witnesses, for trial, (3) a Grand Jury subpoena was prepared in advance and held by Martinez, and (4) psychological pressure was applied by Officer Martinez in an attempt to elicit the alleged bribery money from Powell. All of these events transpired prior to the alleged bribery. The policeman's forcing his way into Powell's car and persistent demand for money until Powell threw $250 on the floor, indicating his reluctance at being forced to pay, is proof that he was not the moving party and did not solicit the policeman, but had been solicited by the policeman throughout.

At the time of the alleged bribery, Martinez could have arrested Powell (Ill.Rev.Stat. 1973, ch. 38, par. 107—2(c)) and charged him with bribery, but did not. Martinez said the assistant state's attorney told him not to arrest Powell. Instead, Powell was served with a Grand Jury subpoena, while a hidden recorder was turned on. The added fact that only selected parts of conversations were recorded, cast a pall over Martinez' entire testimony.

The Illinois Supreme Court (*People* v. *Sheppard* (1949), 402 Ill. 347, 83 N.E.2d 587) pronounced it is the duty of a court to resolve all facts and circumstances in evidence on the theory of innocence rather than guilt, and where the entire record leaves the reviewing court with grave and substantial doubt of guilt the conviction should be reversed.

The defendant claims the State failed to prove beyond a reasonable doubt the alleged solicitation was done with the intent to obstruct the prosecution of any specific person.

The solicitation section of the Illinois Criminal Code provides:

> "* * * A person commits solicitation when, with intent that an offense be committed, he commands, encourages or requests another to commit that offense." Ill.Rev.Stat. (1973), ch. 38, par. 8—1(a).

The obstructing justice section of the Illinois Criminal Code provides, in pertinent part:

> "A person obstructs justice when, with intent to prevent the apprehension or obstruct the prosecution or defense of any person, he knowingly commits any of the following acts:
>
> (a) Destroys, alters, conceals or disguises physical evidence * * *" Ill.Rev.Stat. (1973), ch. 38, par. 31—4.

As the defendant is charged with solicitation to commit obstruction of justice, it is clear, proof must establish he intended justice be obstructed. Further, proof must establish he intended to prevent the prosecution of a specific person, because intent that obstruction of justice was committed cannot be proved here, if intent to prevent the prosecution of a specific person is not proved on trial. In other words, examination of the entire record reveals no proof, nor even allegation, of any intent to obstruct justice, absent the evidence offered which concerns the defendant's intent to prevent his own prosecution. Therefore, intent to prevent his own prosecution must be proven beyond a reasonable doubt, or defendant's conviction of solicitation must be reversed.

Section 2-16 of the Illinois Criminal Code defines prosecution as:

> "* * * all legal proceedings by which a person's liability for an offense is determined, commencing with

the return of the indictment or the issuance of the information, and including the final disposition of the case upon appeal." Ill.Rev.Stat. (1973), ch. 38, par. 2-16.

Inasmuch as the only witness in the solicitation charge against Powell was Martinez, whose credibility is highly suspect due to his admitted perjury, and after a careful examination of the entire record, we hold the prosecution failed to sustain the burden of proving the defendant guilty beyond a reasonable doubt as to the charge of solicitation, and the conviction must be reversed.

For the foregoing reasons the judgments of the circuit court of Cook County convicting the defendant of bribery and solicitation are hereby reversed.

Both judgments are reversed.

LINN and ROMITI, JJ., concur.

APPENDIX C

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellant,

v.

PAUL POWELL,
Defendant-Appellee.

Petition for Leave to Appeal from the Appellate Court of Illinois, First District, No. 61752.
There Heard on Appeal from the Circuit Court of Cook County, County Department, Criminal Division.
Honorable Louis B. Garippo, Judge Presiding.

PETITION FOR REHEARING

The defendant-appellee, Paul Powell, respectfully moves this Honorable Court to grant him a rehearing in this cause and in furtherance of this petition states as follows:

I.

• • •

II.

The Constitution of the State of Illinois prohibits appeals from judgments of acquittal. Article VI, Sec. 6. The fact that the acquittal was rendered by three justices of an appellate court rather than by one judge of a circuit court should weigh in favor of finality of the proceedings instead of against it.

If one trial court judge had ruled the evidence insufficient to convict, no matter how much others may have disagreed, the judgment is final and no appeal can be had. That rule of law is dictated by the Constitution of the United States: *United States* v. *Ball,* 163 U.S. 662 (1895); *Fong Foo* v. *United States,* 369 U.S. 141 (1962); and by the case law in this State: *People* v. *Gallas,* 77 Ill.App.2d 132, 221 N.E.2d 782 (1st Dist. 1966).

This Court now says (in reaffirming *People* v. *Schwartz,* 58 Ill.2d 274) that an appellate court reversal for insufficiency of evidence, which has the same effect of a trial court acquittal, is not final and may be appealed. The inconsistency is glaring and inexplicable.

Two cases are now pending before the United States Supreme Court concerning the continued prosecution of a defendant after an intermediate appellate court has reversed a criminal conviction based on insufficient evidence.

In *Greene* v. *Massey,* 215 So.2d 736, the Florida Supreme Court reversed the conviction of the defendant, finding that after a review of the evidence, there was lacking proof beyond a reasonable doubt that the defendant committed murder in the first degree. The Court, however, sent the matter back for a new trial. On review, the Florida Court of Appeals refused to issue a writ of prohibition on double jeopardy grounds, 302 So. 2d 202. The matter now is before the United States Supreme Court on the question whether the defendant could be retried.

In *Burks* v. *United States,* 547 F.2d 968 (6th Cir. 1977), the Sixth Circuit Court of Appeals reversed, finding the evidence insufficient to establish that the defendant was sane beyond a reasonable doubt. Again, the matter was remanded for a new trial and again, the matter is before the United States Supreme Court.

The cases were both argued on November 28, 1977* and opinions from the Supreme Court are, hopefully, imminent. The opinions in those cases could bar further proceedings (either at the trial level or higher appellate levels) against a defendant in whose favor an appellate court has in effect entered a judgment of acquittal.

We respectfully ask this Court to withhold any ruling on this petition for rehearing until those cases are decided in order to give the defendant the opportunity to cite any favorable ruling from that Court to this Court which may influence this Court in reconsidering its original opinion.

CONCLUSION

For the foregoing reasons, defendant-appellee, Paul Powell, moves this Honorable Court to grant this petition for rehearing and to set aside the original opinion in this case and affirm the Appellate Court's reversal of his conviction.

Respectfully submitted,

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* Synopses of the arguments in both cases can be found in 22 Crim.L.Rptr. 4116-4118.

APPENDIX D

NO. 46976
IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellant,

v.

PAUL POWELL,
Defendant-Appellee.

MOTION FOR LEAVE TO CITE ADDITIONAL AUTHORITIES IN SUPPORT OF PETITION FOR REHEARING

Now comes the appellee, Paul Powell, by and through his attorneys, Harry J. Busch, Patrick A. Tuite, and Sidney Z. Karasik, and moves this Honorable Court for leave to cite as additional authority in support of his petition for rehearing, the case of *Burks* v. *United States,* decided by the United States Supreme Court on June 14, 1978, No. 76-6528, wherein the Court held that a reversal of a criminal conviction by an Appellate Court is the same as a judgment of acquittal by the trial court and bars further prosecution. (The Criminal Law Reporter copy of the opinion is attached hereto and made a part of this motion.) The Court held that "an appellate reversal means that the Government's case was so lacking that it should not have even been *submitted* to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty." (emphasis contained in the Court's opinion)

The United States Supreme Court has, on the same date, ruled that the standards in *Burks* apply to the State court proceedings as well. *Greene* v. *Massey,* No. 76-6617, decided June 14, 1978.

Wherefore, the Appellate Court, having reversed the conviction in the above-entitled cause for insufficiency of evidence, it is improper, under the double jeopardy clause of the Constitution and the authority of *Burks* v. *Unitea States, supra,* to permit the prosecution to go forward and seek further review of that order.

Wherefore, we respectfully move this Honorable Court to grant the petition for rehearing and based upon the authority of *Burks* v. *United States,* to reverse the original order of this Court and affirm the judgment of the Appellate Court of Illinois, First District, which held that the evidence was insufficient to sustain a conviction.

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Attorneys for the Appellee.

APPENDIX E

STATE OF ILLINOIS
OFFICE OF
CLERK OF THE SUPREME COURT
SPRINGFIELD
62706

Clell L. Woods
Clerk

Telephone
Area Code 217
782-2035

July 14, 1978

Mr. Patrick A. Tuite
Attorney at Law
105 West Madison Street
Suite 900
Chicago, Il 60602

In re: People State of Illinois, appellant, vs.
Paul Powell, appellee, No. 49676

Dear Mr. Tuite:

We have today received and filed an order entered by the Court denying the petition for rehearing in the above entitled cause.

Very truly yours,

Clell L. Woods
Clerk of the Supreme Court

CLW:jae
cc: Harry J. Busch
Sidney Z. Karasik
Wm. J. Scott
Bernard Carey

APPENDIX F

STATE OF ILLINOIS
OFFICE OF
CLERK OF THE SUPREME COURT
SPRINGFIELD
62706

Clell L. Woods
Clerk

Telephone
Area Code 217
782-2035

August 4, 1978

Mr. Patrick A. Tuite
Attorney at Law
105 West Madison Street
Suite 900
Chicago, Il 60602

In re: People State of Illinois, appellant, vs.
Paul Powell, appellee. No. 49676

Dear Mr. Tuite:

We have today received and filed an order entered by Justice William G. Clark granting the motion by appellee for stay of mandate pending disposition of a petition for writ of certiorari in the Supereme Court of the United States in the above entitled cause.

Very truly yours,
Clell L. Woods
Clerk of the Supreme Court

CLW:jae
cc: Harry J. Busch
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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-624

PAUL L. POWELL,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Double Jeopardy Clause of the United States Constitution permit a state supreme court to review the judgment of a state appellate court, which reversed the trial court's conviction of the defendant for insufficiency of evidence, where review by the state supreme court will not result in a retrial of the defendant.

ARGUMENT

THE ORDER OF THE SUPREME COURT OF ILLINOIS REVERSING THE ORDER OF THE APPELLATE COURT WHICH REVERSED PETITIONER'S CONVICTION OF BRIBERY AND SOLICITATION DOES NOT RUN AFOUL OF THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE IT WILL NOT RESULT IN A SECOND TRIAL OF PETITIONER.

This Court has observed that the Double Jeopardy Clause provides three related protections:

> It protects against a second prosecution for the same offense after an acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense. *North Carolina* v. *Pierce*, 395 U.S. 711, 23 L. Ed. 2d 656 (1969).

Where there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended. In various situations where appellate review would not subject the defendant to a second trial, this Court has held that an order favoring the defendant could be constitutionally appealed by the Government. Thus, the Government has been permitted to appeal from orders arresting judgment after a verdict has been entered against the defendant. See: *United States* v. *Bramblett*, 348 U.S. 503, 99 L. Ed. 594 (1955); *United States* v. *Green*, 350 U.S. 415, 100 L. Ed. 494 (1956). Since a reversal on appeal would merely reinstate the jury's verdict, review of such an order does not offend the policy against multiple prosecutions.

Similarly, it is well settled that an appellate court's order reversing a conviction is subject to further review

where the appellate court has ordered the indictment dismissed and the defendant discharged. *Forman* v. *United States,* 361 U.S. 416, 4 L. Ed. 2d 412 (1960). As this Court pointed out in *United States* v. *Wilson,* 420 U.S. 332, 43 L. Ed. 2d 232 (1975),

> * * * Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a *defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact.* (emphasis supplied). *Id.* 43 L. Ed. 2d at 242-43.

It is submitted that the controlling constitutional principle underlying the Double Jeopardy Clause is the prohibition against multiple trials. Therefore, where a Government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended. *United States* v. *Martin Linen Supply Co.,* 430 U.S. 564, 51 L. Ed. 2d 642, 650 (1977).

The present case involves a situation where the State of Illinois' appeal to the Illinois Supreme Court will not result in a retrial of the petitioner. The petitioner, an attorney, was convicted of bribery and solicitation by the trial court in a bench trial. On petitioner's appeal from both convictions, the appellate court reversed the trial court on the ground that the evidence was insufficient to support either conviction. (Petition for writ of certiorari, App. A. p. 1). On its review of the appellate court's judgment, the Illinois Supreme Court concluded that the trial judge "found the evidence sufficient, and we find nothing in this record justifying a contrary conclusion." The court then reversed the appellate court's judgment and affirmed the trial court's judgment convicting petitioner of bribery and solicitation. (Petition of writ of certiorari, App. A, p. 1)

As can be readily seen from this brief analysis, the Illinois Supreme Court simply reviewed the judgment of the appellate court, and determined, as a matter of law, that there was sufficient evidence to convict petitioner of bribery and solicitation, and the appellate court's judgment to the contrary was erroneous. The Illinois Supreme Court's judgment did not result in a retrial of petitioner; it did result in a reinstatement of the trial court's judgment of conviction. Under the above cited decisions of this Court, no double jeopardy will result from such a review of an appellate court decision by a State's highest tribunal.

The petitioner bases his double jeopardy argument almost exclusively upon two recent decisions of this court, *Burks* v. *United States,* —— U.S. ——, 57 L. Ed. 2d 1 (1978), and *Greene* v. *Massey,* —— U.S. ——, 57 L. Ed. 2d 15 (1978). Neither of these decisions is applicable to the case at bar. In *Burks,* this Court held "that the Double Jeopardy Clause *precludes a second trial* once the reviewing court has found the evidence legally insufficient." (Emphasis supplied) (57 L. Ed. 2d at 14). In *Greene* this Court granted certiorari "to decide whether a state may *retry* a defendant after conviction has been reversed by an appellate court on the ground that the evidence introduced at the prior trial was insufficient . . ." (Emphasis supplied) (57 L. Ed. 2d at 18). Both cases stand for the proposition that the State may not retry a defendant without violating the Double Jeopardy Clause after a reviewing court has determined that the defendant's conviction must be reversed because the evidence produced at the first trial was legally insufficient to convict. Neither case—contrary to petitioner's assertion—stands for the proposition that a determination by a state appellate court that the evidence is legally insufficient to support a conviction, may not be reviewed by that state's supreme court without violating double jeopardy.

As a matter of fact this Court recognized in *United States* v. *Wilson*, 420 U.S. 332, 43 L. Ed. 2d 232 (1975) and *United States* v. *Jenkins*, 420 U.S. 358, 43 L. Ed. 2d 250 (1975) that the constitutional protection of double jeopardy against Government appeals attaches only where there is a danger of subjecting the defendant to a second trial for the same offense. In *Wilson* this Court noted that,

> When a case has been tried to a jury, the Double Jeopardy Clause does not prohibit an appeal by the Government providing that a retrial would not be required in the event the Government is successful in its appeal.
>
> When this principle is applied to the situation where the jury returns a verdict of guilt but the trial court thereafter enters a judgment of acquittal, an appeal is permitted. In that situation a conclusion by an appellate court that the judgment of acquittal was improper does not require a criminal defendant to submit to a second trial; the error can be corrected on remand by the entry of a judgement on the verdict. To be sure, the defendant would prefer that the Government not be permitted to appeal or that the judgment of conviction not be entered, but this interest of the defendant is not one that the Double Jeopardy Clause was designed to protect.* (43 L. Ed. 2d at 256-57)

Because the government's appeal to the Illinois Supreme Court did not result in a retrial of the petitioner and the error in the appellate court's judgment can be corrected upon remand to the trial court by reinstatement of the conviction, double jeopardy will not occur.

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* This Court also observed that the principle is the same whether the case was originally tried to a jury or a judge in a bench trial.

CONCLUSION

The above cited decisions establish beyond doubt that the Illinois Supreme Court in the instant case could properly review the appellate court's judgment without violating the Double Jeopardy Clause as long as that review will not result in a retrial of the peitioner. Since the Illinois Supreme Court's review of this case did not result in such a retrial, no federal constitutional right of petitioner's has been violated and it is respectfully requested that a writ of *certiorari* be denied.

Respectfully submitted,

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